

EXHIBIT 23

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In accordance with a protective order, the enclosure(s) shall be treated as confidential and shall not be shown to any person other than those persons designated in paragraph 8.2 of the paragraph order.

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF WYOMING

3 -----:
4 CUSTODIA BANK, INC., :
5 :
6 Plaintiff, :
7 : Case No.
8 vs. : 1:22-cv-00125-SWS
9 :
10 FEDERAL RESERVE BOARD OF :
11 GOVERNORS and FEDERAL RESERVE :
12 BANK OF KANSAS CITY, :
13 :
14 Defendants. :
15 -----:

16 CONFIDENTIAL DEPOSITION OF
17 PETER CONTI-BROWN, PH.D.

18 DATE: Thursday, December 14, 2023
19 TIME: 8:09 a.m.
20 LOCATION: King & Spalding, LLP
21 1700 Pennsylvania Avenue, N.W.
22 Washington, D.C. 20006
23 Reported by
24 REPORTED BY: Erick M. Thacker
25 Reporter, Notary

26 Veritext Legal Solutions
27 1250 Eye Street, NW, Suite 901
28 Washington, D.C. 20005

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1 depository institutions, which is the -- the term
2 used in -- in and around the Monetary Control
3 Act.

4 Q Okay. So it's your opinion, then, that
5 all state-chartered institutions that are legally
6 eligible -- sorry. Strike that.

7 All state-chartered depository
8 institutions that are legally eligible are
9 automatically entitled to unfettered access to
10 all of the Fed's priced services?

11 A I'll leave the legal conclusions to the
12 Court to determine. My opinions are about the
13 intentions of the statutory framers of the
14 Monetary Control Act and the practices of the
15 Federal Reserve from 1980 to the present and
16 understanding that -- that authority, that --
17 that question.

18 I take your question to be a legal one.
19 I don't offer an opinion on that legal
20 conclusion.

21 Q But you -- it is your opinion, though,
22 that Congress intended through the Monetary

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1 Control Act to accomplish that result?

2 A It's my opinion that the framers of
3 the -- of the Monetary Control Act intended to
4 equalize access to the Federal Reserve's priced
5 services to all depository institutions that were
6 legally eligible for them.

7 Q And by equalized access, are you
8 referring there to unfettered access to all of
9 the Fed's priced services?

10 A Can you define for me what you mean by
11 unfettered?

12 Q Unconditional. And you're referring
13 here to initial access or ongoing access, or what
14 do you mean by that?

15 A Both.

16 Q No, not necessarily. There are
17 instances consistent in Fed history where
18 determinations are made that -- that access --
19 ongoing access to -- to some priced services can
20 be conditioned consistent with legislation and
21 regulation.

22 Q And what's an example of that?

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1 A So, for example, a legally eligible
2 depository institution that has gained access to
3 the discount window can have that access
4 conditioned on the quality of collateral, the
5 quality of its own balance sheet, regulatory and
6 supervisory assessments, some of which are
7 defined by statute, some by regulation, some by
8 supervision.

9 Q And -- and it's your opinion that the
10 Federal Reserve can exercise its discretion
11 over -- over access to that service applying
12 those conditions?

13 A Tell me what you mean by discretion
14 here.

15 Q Well, will use its judgment to manage
16 the risk presented and determine what the
17 appropriate collateral level is, et cetera.

18 A It's my opinion that the Federal
19 Reserve can use its judgment consistent with the
20 legislation and regulation in reaching ultimate
21 conclusions, but it can't use its judgment
22 inconsistent with its -- the legislation or

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1 regulation.

2 Q Okay. And what's the legislation that
3 gives the Fed the power to exercise its
4 discretion over -- to apply those conditions that
5 you were just describing?

6 A The Federal Reserve Act at it's been
7 amended over the years.

8 Q And which provision?

9 A So the discount window -- I can't speak
10 to every provision because the Federal Reserve
11 Act is a complex statute, but at least Section
12 10B would be relevant to the -- to the discount
13 window, but other -- other sections as well
14 govern, you know, the -- the scope of -- of
15 authority of the Federal Reserve.

16 Q Are you familiar with Fedwire?

17 A I am.

18 Q What is Fedwire?

19 A Fedwire is a payment rail that is owned
20 and operated by the Federal Reserve.

21 Q Okay. So does the -- in your opinion,
22 does the Federal Reserve have discretion to

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1 impose conditions on access to Fedwire to legally
2 eligible, state-chartered depository
3 institutions?

4 A I haven't looked sufficiently to see
5 the -- the context around Fedwire's
6 implementation to understand whether the judgment
7 we're talking about would be consistent with --
8 with the law in the same way that I have with the
9 passage and implementation of the Monetary
10 Control Act.

11 Q Okay. But your opinion on the meaning
12 of the Monetary Control Act implicates access to
13 Fedwire, right?

14 A Insofar as Fedwire is a priced service
15 offered by the Federal Reserve as -- as relevant
16 to the Monetary Control Act, yes.

17 Q Okay. And -- but are you saying that
18 you haven't looked at whether there are other
19 statutes that bear on the Federal Reserve's
20 ability to apply discretion to access to Fedwire?

21 A That's right.

22 Q Okay. What did you do to prepare for

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1 Q Irrespective of which state's issuing
2 the charter?

3 A That's right.

4 Q And even irrespective of whether it's a
5 territory issuing the charter, correct?

6 A I understand in the banking laws that
7 state is defined to include the District of
8 Columbia and the territories of the United
9 States.

10 Q Okay. And this access would be
11 irrespective of whether the state-chartered
12 depository institution has insurance, right?

13 A There I would say whether it has
14 eligibility to apply for insurance, but
15 irrespective of whether that insurance has been
16 received.

17 Q Okay. And the access would be
18 available -- the Fed's priced services would be
19 available irrespective of whether the institution
20 presented risk to the federal payment system?

21 A The -- I'm trying to think through that
22 question as it relates to my answer earlier about

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1 the discount window. Certainly, it is the case,
2 as we have seen recently in the spring of 2023,
3 that the Federal Reserve has cut off insolvent
4 institutions from access to its services, and I
5 don't express the opinion that they have done so
6 inconsistent with the intentions of the framers
7 of the MCA when they acted in that way.

8 So if that -- if we take your question
9 about risk to include situations where a legally
10 eligible depository institution has become
11 insolvent, then I would think that risk is
12 relevant to -- to that question.

13 To the extent that it is giving the Fed
14 discretion to block legally eligible depository
15 institutions, then I would say that that -- that
16 that discretion was not -- is inconsistent with
17 the intentions of the framers of the MCA.

18 Q So your bottom line is that a
19 state-chartered depository institution that's
20 legally eligible can get access to the Fed's
21 priced services even if doing so presents risk to
22 the payment system?

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1 A That is my opinion, yes.

2 Q Okay. And is it also your opinion that
3 a legally eligible, state-chartered depository
4 institution can get access to Fed services even
5 if doing so would hinder the Fed's ability to
6 implement monetary policy?

7 A That is my opinion, yes.

8 Q And it's your opinion that that was
9 what was intended by Congress in 1980?

10 A Yes. Now, there are -- there were
11 discussions in -- in the late fall of 1979 and
12 winter of 1980 that preceded the passage of the
13 MCA that were focused on the ways that the regime
14 that preceded the MCA had complicated efforts for
15 monetary policy. That explains the motivation
16 for the equalization treatment that the MCA
17 framers intended, but the MCA discussion did not
18 include discussion of prospective alteration of
19 that authority by the Federal Reserve
20 unilaterally to assist future changes in monetary
21 policy. That was a long answer to your question.

22 So the short answer is, I -- it is my

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1 opinion that the Federal Reserve does not have
2 the discretion to both define its monetary policy
3 space and then to exclude legally eligible,
4 state-chartered depository institutions from its
5 priced services in service of that monetary
6 policy space.

7 Q And do you understand that what -- what
8 Congress intended to accomplish in the Monetary
9 Control Act is -- is a legal dispute in this
10 case?

11 A No.

12 MR. SCARBOROUGH: Objection to form.

13 THE WITNESS: I don't understand that,
14 no.

15 BY MR. MICHAELSON

16 Q Okay. You -- you're a lawyer, right?
17 You went to law school?

18 A I did go to law school, yes.

19 Q And you -- you clerked for a judge,
20 two, correct?

21 A For two judges, yes.

22 Q For two judges. So how -- how do

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1 courts go about interpreting statutes?

2 MR. SCARBOROUGH: Objection.

3 THE WITNESS: I don't know how -- you
4 know, this is the subject of great scholarly
5 debate, how they do, how they should. Courts are
6 different in different ways.

7 I'm not offering -- the reason I
8 don't -- I didn't agree with your earlier
9 question is that I -- I offer my expertise here
10 as a historian of banking, and I'm not offering
11 an opinion on the legal interpretation of the
12 statute. And so the intentions of the statutory
13 framers, while maybe useful to the Court in terms
14 of interpreting specific provisions, my -- of
15 the -- of the statute, that I would regard as a
16 legal dispute.

17 What I'm offering is a perspective on
18 the Fed's history from 1913 to 1980, how members
19 of Congress and others understood the changes
20 that occurred in 1980, and then how the Federal
21 Reserve understood and implemented those changes
22 from 1980 to 2015, and then, finally, how it

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1 Central Bank of Bangladesh.

2 Q You first reference the regulatory
3 framework around Fedwire. What are you referring
4 to there?

5 A The Federal Reserve issued rules
6 governing the use of Fedwire, as I recall. I
7 don't have them in front of me or could -- I
8 could offer you its -- its citation, but it has
9 rules about the use of Fedwire by master account
10 holders.

11 Q And when were those first promulgated,
12 those rules?

13 A I don't recall the date.

14 Q Was it in the 1980s?

15 A I think it would have been the late
16 1980s, but I'm not certain of that. It might
17 have been -- it might have been before or after.
18 I can't say.

19 Q In any event, was it before 2000?

20 A Before -- it was before 2000.

21 Q Okay. And this would be an instance of
22 the Federal Reserve imposing conditions on master

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1 account holders' access to wire transfer
2 services, correct?

3 A No, I don't see it that way.
4 Conditions, I think of being bespoke,
5 idiosyncratic, applicable to individual account
6 holders. These are regulations that apply to all
7 account holders in making their use of Fedwire
8 services. So I think regulation is the term that
9 I would use to describe the way that the Fed
10 interacted with master account holders in this
11 respect.

12 Q Are you aware of any instance in which
13 the Federal Reserve publicly claimed that it had
14 the authority to terminate a specific master
15 account holder's access to Fedwire prior to 2015?

16 A I -- I am not aware of an instance such
17 as that.

18 Q Okay. All right. So we're marching
19 through these covered services here.

20 And with respect to No. 2, the check
21 collection services, you recalled, in the 1980s,
22 the Federal Reserve terminating access to that

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1 service for certain master account holders,
2 correct?

3 A That's right.

4 Q And with respect to wire transfer
5 services, is your testimony that through the
6 regulatory framework promulgated by the Fed,
7 they've restricted access to those services to
8 certain master account holders under certain
9 conditions?

10 MR. SCARBOROUGH: Objection to form.

11 THE WITNESS: No. I -- I can't recall
12 the specific contours of its regulatory framework
13 and whether it excluded specific master account
14 holders. I know that it did create the rules of
15 engagement for all master account holders. What
16 more those rules had, I would have to -- I'd need
17 to be refreshed by reviewing those rules --

18 MR. MICHAELSON: Okay.

19 THE WITNESS: -- before I could
20 comment.

21 BY MR. MICHAELSON

22 Q Moving on to No. 4, Automated Clearing

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1 A That's right.

2 Q But it's also your opinion that from
3 1980 to 2015, the Federal Reserve asserted the
4 authority to terminate a master account holder's
5 access to services?

6 A That's right.

7 Q Okay. Let's go to page -- paragraph --
8 well, paragraph 42 is -- this is legislative
9 history concerning passage of the Monetary
10 Control Act?

11 A This is the testimony of fed chair --
12 then Fed Chair Paul Volcker discussing his view
13 on the proposed change of law, which he
14 supported.

15 Q And paragraph -- it sets the
16 legislative history of the Monetary Control Act,
17 correct?

18 A Yes. So I would regard that to be as
19 part of the legislative history, yes.

20 Q And paragraph 43 also contains
21 legislative history on the Monetary Control Act?

22 A That's right, testimony of one of the

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1 bill's sponsors.

2 Q Okay. And you -- you'd agree that the
3 presentation of legislative history on the
4 Monetary Control Act reflected in your opinion is
5 not complete, correct?

6 MR. SCARBOROUGH: Objection.

7 THE WITNESS: Can you define for me
8 what a complete legislative history would be?

9 BY MR. MICHAELSON

10 Q Well, isn't it the case that part of
11 the legislative history of the Monetary Control
12 Act reflects a concern among Congress that the
13 percentage of banks or Fed members was declining?

14 A That was the concern of some members of
15 Congress, no question.

16 Q All right. Federal membership was
17 declining, correct?

18 A That's right.

19 Q And that was a concern for banking
20 regulators, correct?

21 A For -- the decline in Fed membership
22 rates was a concern for some bank regulators, not

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1 all.

2 Q And what was the concern?

3 A The concern here was that in the fall
4 of 1979, the Federal Open Market Committee
5 launched a wholesale reorientation of its
6 monetary policy regime that required more
7 varieties of -- of efforts to control monetary
8 policy. And Paul Volcker's concern and the
9 concern of some others that the Federal Reserve,
10 although not a concern shared by all, was that
11 the ability to manage this new monetary policy
12 system was limited by the decline in Fed
13 membership.

14 Q And so -- so fair to say that
15 Volcker's -- well, Volcker's concern was that
16 declining Fed membership could impair the Federal
17 Reserve's ability to implement monetary policy?

18 A That's right.

19 Q And so one purpose of the Monetary
20 Control Act was to reinforce the Federal
21 Reserve's ability to implement monetary policy?

22 A That's right.

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1 Q And one way that it did that is by
2 empowering the Federal Reserve to impose reserve
3 requirements on depository institutions, correct?

4 A That's right.

5 Q Including state-chartered nonmember
6 depository institutions, correct?

7 A That's right.

8 Q In that sense, the Monetary Control Act
9 increased the Federal Reserve's authority over
10 the banking system?

11 A That's right.

12 Q Okay. And that's not reflected here in
13 paragraphs 42 and 43 of your report, correct?

14 A That's right.

15 Q Okay. Let's -- let's go to -- well,
16 sticking with paragraph 45 here, you write --
17 it's on the top of page 18 -- that no provision
18 of the Monetary Control Act exempts a particular
19 Federal Reserve payment service or indicates that
20 providing payment services would be a
21 discretionary matter with the Federal Reserve?

22 A Not that I saw either in -- either in

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1 any of the bills or in the ultimate statute that
2 they produced.

3 Q So referring to Exhibit 300, which
4 is -- which is 248a, under (c), subsection
5 (c)(2), there's a clause -- I'll direct your
6 attention to the clause at the end of (c)(2),
7 which says, "except that nonmembers shall be
8 subject to any other terms, including a
9 requirement of balances sufficient for clearing
10 purposes that the Board may determine are
11 applicable to member banks."

12 Do you see that?

13 A I do.

14 Q Doesn't that section give the Federal
15 Reserve discretionary authority over access to
16 services?

17 MR. SCARBOROUGH: Objection to form.

18 THE WITNESS: No.

19 BY MR. MICHAELSON

20 Q What -- what does that clause refer to,
21 then?

22 A So, again, recognizing that I'm, in my

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1 a particular service between 1980 and 2015?

A For solvent institutions --

For solvent institutions.

4 A -- that did not fail? Again, the
5 instance of the -- the hijacked Central Bank of
6 Bangladesh instance, which would have been a
7 master account holder with a transaction that was
8 blocked, so that would be an example. That may
9 have been after 2015, though. I can't -- I can't
10 recall.

11 Q And how about not an actual assertion
12 of this power, but a -- but a claim to this
13 power? And that I mean the power to terminate
14 access to a service for a solvent institution.

15 A I have not seen that claim, and I did
16 not see that claim until 2015, in the instance of
17 the Fourth Corner Credit Union.

18 MR. MICHAELSON: Okay. Let's look
19 at -- we'll just do one more document before we
20 break here. Mark this as Exhibit 301, I guess.

21 (Deposition Exhibit Number 301 was
22 marked for identification.)

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1 BY MR. MICHAELSON

2 Q So I put in front of you a document
3 marked Exhibit 301, which is a document from the
4 Federal Reserve Bank of Dallas, and it attaches,
5 beginning the fourth page, a publication from the
6 Federal Register.

7 Do you see that?

8 A I do see that.

9 Q And this is Federal Register, Volume
10 50, No. 99, page 21120, titled "Policy Statement
11 Regarding Risks on Large Dollar Wire Transfer
12 Systems."

13 Do you see that?

14 A I do.

15 Q This is a policy that is set with an
16 effective date in 1986.

17 Do you see that?

18 A I do.

19 Q Okay. And, actually, the Fed Register
20 notice is at the top of the page. It's May 22nd,
21 1985. Do you see this? Do you see that?

22 A Where are you --

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1 Q Just at the top of the page.

2 A Oh, yeah. I see it. Yeah.

3 Q Okay. Is -- earlier you referred to a
4 policy statement from around this time period
5 regarding money transfers.

6 Is this the policy that you were
7 referring to?

8 A It is.

9 Q Okay. So you're familiar with this
10 policy?

11 A I am.

12 Q You've seen it before?

13 A I have.

14 Q And it's -- and it's public?

15 A It is.

16 Q What -- what is daylight -- what are
17 daylight overdrafts?

18 A I'm not exactly sure of the precise
19 definition. My general sense is that an
20 overdraft that occurs in the same day with
21 additional transactions being ordered on that
22 same account during that same day, but I'm not

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1 certain that that's true.

2 Q Okay. I'll refer you to page 21123.

3 In the bottom -- bottom right-hand corner, this
4 provides, "The Board is still concerned with
5 these overdrafts, and believes that it is
6 appropriate to take effective steps to control
7 risks to the Federal Reserve Banks by placing
8 more effective limits on Fedwire daylight
9 overdrafts."

10 Do you see that?

11 A I do.

12 Q Okay. And do you agree that -- that
13 this -- this policy is -- was public at the time?

14 A Yes.

15 Q And it reflects an assertion of Federal
16 Reserve authority to impose conditions and
17 restrictions on access to priced services?

18 MR. SCARBOROUGH: Objection to form.

19 THE WITNESS: Again, I would say that I
20 see the word "conditions" and "regulations" as
21 performing very different purposes for the Fed's
22 assertions of authority. I hear this as creating

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1 regulation rather than conditionality, which I
2 would regard as -- conditions I would think of as
3 more bespoke and idiosyncratic.

4 I hear -- I see in this document the
5 regulation and the record of that regulation even
6 as it's described as a policy statement in the
7 Federal Register for rules that apply to the
8 entire system as opposed to conditions placed on
9 individual account holders.

10 Q But -- but doesn't this regulation
11 reflect an assertion of the Federal Reserve to
12 restrict individual institutions access to
13 services based on risk presented by that
14 institution?

15 MR. SCARBOROUGH: Objection to form.

16 THE WITNESS: I don't think I
17 understand how that -- how your last statement
18 would be correct in the sense -- so the -- the
19 conditions that I've seen the Federal Reserve
20 impose on an account holder's master account are
21 the most -- the most striking example is with the
22 American Samoa Bank. Those I would regard as

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1 conditions. They're specific to the American
2 Samoa Bank. They cut off access to the discount
3 window. They require additional supervisory
4 impositions. That I see as conditions. I don't
5 see -- I've never seen any policy statement or
6 regulatory statement as relevant to the American
7 Samoa Bank.

8 As I review this 1985, '86 document, I
9 would say that this imposes a regulatory system
10 on the use of Fedwire as opposed to
11 conditionality, but I recognize, too, that I am
12 defining the terms as I use them.

13 BY MR. MICHAELSON

14 Q Well, this -- this policy, you'd agree,
15 reflects the Federal Reserve's assertion of the
16 power to terminate access to priced services to
17 specific institutions based on the risk presented
18 by those institutions?

19 MR. SCARBOROUGH: Objection to form.

20 BY MR. MICHAELSON

21 Q Do you agree?

22 A Can you point me to where -- the

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1 intend for the Federal Reserve to usurp the
2 determination from other supervisory authorities
3 that had been given that authority in other
4 statutes.

5 BY MR. MICHAELSON

6 Q But as you've said, Congress -- it was
7 not Congress's intent to eliminate entirely the
8 Federal Reserve System to -- the Federal
9 Reserve's power to conduct risk assessments of
10 institutions with master accounts, correct?

11 A Can you point to me when -- to when I
12 said that sentence? I don't -- I don't believe I
13 said it that way.

14 The way I would say it is that Congress
15 did not prevent -- again, without getting to the
16 legal determination, the framers of the MCA did
17 not engage substantially with the question of the
18 Fed's risk assessments around its priced
19 services. And, again, I can't recall any
20 instances of that discussion.

21 Q And at least we've seen here in Exhibit
22 301 that as of 1985, the Federal Reserve was

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1 claiming the power to conduct such risk
2 assessments, correct?

3 MR. SCARBOROUGH: Objection.

4 THE WITNESS: The -- I read Exhibit 301
5 to contain a regulation regarding what the Fed
6 shall do in the event of daylight overdrafts and
7 what to do to manage the question of daylight
8 overdrafts.

9 BY MR. MICHAELSON

10 Q Okay. And to prohibit the use of
11 Fedwire where an institution's use of Fedwire
12 would prevent risk to the Reserve Bank?

13 MR. SCARBOROUGH: Objection.

14 THE WITNESS: Again, just reading from
15 it, I would say that the 1985 policy statement
16 has a regulation that asserts the Reserve Bank's
17 right to protect its risk exposure from those --
18 those banks.

19 BY MR. MICHAELSON

20 Q Okay. I'm handing you a document
21 marked Exhibit 302, which is Operating Circular 1
22 from 1998.

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1 Are you familiar with OC1?

2 A I am.

3 Q And have you seen -- this is from 1998.

4 Have you seen this version before?

5 A I have.

6 Q And this was public, right?

7 A It -- it is.

8 Q Okay. I'd direct your attention to
9 Section 1.1, called "Scope."

10 Third paragraph, it says, "Your master
11 account is subject to Federal Reserve policies
12 such as those on payment system risk, reserve
13 balances and clearing balances as they may be
14 revised from time to time."

15 Do you see that?

16 A I do.

17 Q And this is a reference to policies
18 like the statement on large dollar wire transfers
19 that we were just looking at?

20 A That's right.

21 Q Okay. So this -- this is also another
22 example of the Federal Reserve asserting the

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1 power to -- asserting the power to decide whether
2 to grant use of priced service, correct?

3 MR. SCARBOROUGH: Objection.

4 THE WITNESS: No.

5 BY MR. MICHAELSON

6 Q Well, it's -- it's -- it's saying that
7 your master account is subject to the policy that
8 we were just looking at, right?

9 A That's right.

10 Q And in that policy, the Federal Reserve
11 asserted the authority to conduct risk
12 assessments to protect -- for the purpose of
13 protecting Reserve Banks from risk presented by
14 individual institutions, right?

15 MR. SCARBOROUGH: Objection.

16 THE WITNESS: That's right.

17 BY MR. MICHAELSON

18 Q Okay. And where risk was presented,
19 the Federal Reserve was claiming the authority to
20 cut off use of Fedwire to mitigate risk, correct?

21 MR. SCARBOROUGH: Objection.

22 THE WITNESS: Again, we have a

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1 different view on -- on the question of what
2 constitutes cutoff. And why I said no to my --
3 in my answer to your first question was because
4 you used the word "grant," which I took to be a
5 verb indicating access.

6 I don't read the 1985 policy statement
7 and don't see in the '98 Operating Circular 1 the
8 assertion that the Fed could reimpose discretion
9 as it has with Fed membership status on access to
10 accounts before 1998 and the master account
11 thereafter.

12 BY MR. MICHAELSON

13 Q Okay. I'll refer you to Section 2.3,
14 entitled "Establishing a Account," and the last
15 sentence of the first paragraph is "All master
16 accounts are subject to Reserve Bank approval."

17 Do you see that?

18 A I do.

19 Q So as of 1998, the Federal Reserve was
20 taking the position that master accounts are
21 subject to approval by a Reserve Bank?

22 A That's right.

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1 Q And in Section 2.8 on the following
2 page, on the right-hand side of the page, middle
3 of top paragraph there, there's a sentence that
4 reads, "We may close your master account or
5 terminate our approval of a pass-through
6 relationship at any time."

7 Do you see that?

8 A I do see that.

9 Q So as of 1998, the Federal Reserve was
10 asserting the power to close an institution's
11 master account at any time?

12 A That's right.

13 MR. MICHAELSON: All right. Let's mark
14 this.

15 (Deposition Exhibit Number 303 was
16 marked for identification.)

17 BY MR. MICHAELSON

18 Q I've put in front of you a document
19 marked 303. It's an exhibit marked 303. It's
20 federal -- from the Federal Register, entitled
21 "Policy on Payments System Risk," Federal
22 Register, Volume 69, No. 230, 69926. This is

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1 dated December 1, 2004.

2 Do you see that?

3 A I do.

4 Q Are you familiar with this policy on
5 payment system risk from 2004?

6 A Generally speaking, yes. I haven't
7 examined it thoroughly.

8 Q When's the last time you reviewed it?

9 A I glanced at it yesterday. Before
10 that, it had been -- it had been several months.

11 Q Okay. Direct your attention to the
12 page 69929. On the far left -- left column,
13 first full paragraph, it says, "Part II of this
14 policy governs the provision of intraday or
15 daylight credit in accounts of the Reserve
16 Banks."

17 Do you see that?

18 A I do.

19 Q And it says that it "sets out the
20 general methods used by the Reserve Banks to
21 control their intraday credit exposures."

22 Do you see that?

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1 A I do.

2 Q Do you agree that as of 2004, Reserve
3 Banks were applying methods to control their
4 intraday credit exposures?

5 A I am not familiar with what the Federal
6 Reserve Banks were doing in terms of their risk
7 exposure assessments for account holders. I'm
8 familiar only with the policy statement from 2004
9 describing -- describing it. So I'm familiar
10 with the policy statement, but not the --

11 Q Not the actual --

12 A -- practice itself.

13 Q -- practice. But you have no reason to
14 dispute that Reserve Banks were, in fact,
15 undertaking methods to control their intraday
16 credit exposures, correct?

17 A No reason to -- I have no reason to
18 dispute it, but I -- again, I don't -- I haven't
19 evaluated what those methods are.

20 Q Okay. Do you know if those methods
21 included assessments of whether individual
22 institutions presented risk to the Reserve Bank?

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1 Q Okay. And continuing on in Section II,
2 flip forward a couple pages to 69935. There's a
3 Section C on net debit caps.

4 Q Are you familiar with a net debit cap?

5 A I am not.

6 Q Do you know what a net debit cap is?

7 A I do not.

8 Q All right. The last -- in the
9 paragraph underneath "Net Debit Caps," the last
10 sentence, it says, An institution must be
11 financially healthy --

12 A I don't see where you are. I'm sorry.

13 Q Oh, so underneath "Net Debit Caps," No.
14 1 is Definition."

15 A Yeah.

16 Q Okay. The last sentence of the first
17 paragraph there.

18 A Yes, I see.

19 Q "An institution must be financially
20 healthy and have regular access to the discount
21 window in order to adopt a net debit cap greater
22 than zero to qualify for the filing exemption."

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1 Do you know what this refers to?

2 A I know in general terms what
3 constitutes regular access to the discount
4 window. I have a general sense of what a net
5 debit cap is, but I don't know what the
6 qualification for a filing exemption is.

7 Q Okay. Go ahead to 69937. The upper
8 left corner, the last sentence of the -- of the
9 paragraph in the upper left corner, it says, "For
10 example, if the institution's level of daylight
11 overdrafts constitutes an unsafe or unsound
12 banking practice, the Reserve Bank would likely
13 assign the institution a zero net debit cap and
14 impose additional risk controls."

15 Do you see that?

16 A I do.

17 Q Would you agree that this reflects the
18 Federal Reserve's assertion of power over use
19 of -- no, strike that.

20 Would you agree that this reflects, as
21 of 2004, the Federal Reserve's assertion of power
22 over the use of priced service?

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1 A Over its use, yes.

2 Q Okay. Including the power to impose
3 risk controls to mitigate risk to the Reserve
4 Bank?

5 A If we're defining zero in the net debit
6 cap and as a risk control, which the policy
7 statement seems to do, then yes.

8 Q Okay. Are you familiar with OC3,
9 Operating Circular 3?

10 A Not by its name.

11 Q But do you have a general understanding
12 of what OC3 relates to?

13 A No. I would need to review it.

14 Q When's the last time that you reviewed
15 OC3?

16 A If you could -- if I could see it, I
17 could tell you. I don't know what OC3 -- I mean,
18 I know it's an operating circular, but I would
19 need to see it before I could answer the
20 question.

21 Q Okay. How about OC4? Do you know what
22 OC4 is?

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1 A Again, not by its name.

2 Q Sitting here today, you don't know what
3 OC4 relates to?

4 A That's right.

5 Q Okay. And how about OC5? Are you
6 familiar with OC5?

7 A No.

8 Q Okay. So referring back to your --
9 referring back to your paragraph 59 here, you say
10 you found no evidence --

11 A Can you give me a second to --

12 Q Yeah, sure.

13 A -- go back?

14 Q It's Exhibit 299, your report, at page
15 25, paragraph 59.

16 A Okay. Paragraph what?

17 MS. CARLETTA: Page 25, paragraph 59.

18 THE WITNESS: Got it.

19 BY MR. MICHAELSON

20 Q So you're opining here that you found
21 no evidence of the Federal Reserve asserting
22 power to decide whether to grant priced services

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1 to legally eligible depository institutions,
2 correct? That's your -- that's your opinion
3 here?

4 A That's right.

5 Q But would you agree that between 1980
6 and 2015, the Federal Reserve was asserting the
7 power to decide whether all priced services would
8 be available to all legally eligible,
9 state-chartered depository institutions?

10 MR. SCARBOROUGH: Objection to form.

11 THE WITNESS: No, I would not. I would
12 say that between 1980 and 2015, at several
13 different junctures, the Federal Reserve issued
14 policy statements and regulations governing the
15 general provision of its priced services,
16 including some regulations that governed the use
17 of those services.

18 The statement that I make -- the
19 opinion that I offer in paragraph 59 of my report
20 refers to the idiosyncratic decisions to grant
21 priced services to individual legally eligible
22 depository institutions.

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1 BY MR. MICHAELSON

2 Q Well, but the -- but the regulations
3 that you're referring to included regulations in
4 which the Federal Reserve asserted the power to
5 conduct risk assessments of specific
6 institutions, correct?

7 A That's right.

8 Q And the power to impose restrictions on
9 an individual institution's use of services based
10 on the risk presented by that institution,
11 correct?

12 A The key difference here between my
13 opinion and those regulations is that I am
14 referring to assertion of authority over specific
15 requests to access priced services, the
16 reciprocal for which is the granting of those
17 priced services, not to the regulatory framework
18 that might govern its use.

19 The policy statements that we've read
20 together today refer to the regulatory framework
21 for the use of priced services, including risk
22 assessments, over their use. In the extreme

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1 has issued countless banking -- pieces of banking
2 legislation, each with -- especially after 1935
3 and the permanent institution of the FDIC, with a
4 specific lane of movement for the FDIC, OCC,
5 Federal Reserve, and state banking authorities,
6 and so the MCA comes from that legal context.

7 That legal context means that the very
8 kinds of assessments that we're talking about
9 here are a supervisory context for the
10 specifically designated supervisor to respond to.
11 In some cases, that would be the Fed, in some
12 cases, the OCC, in others, the FDIC, and in
13 others, the state banking authorities.

14 But for the Federal Reserve to then say
15 that it has the authority or the -- or it would
16 adopt the practice of usurping these other
17 entities within a financial system is something
18 that I am not aware of anyone around the passage
19 of the MCA even contemplating, including at the
20 Federal Reserve, because it had never been done
21 in that way before.

22 Q If every bank is unique then isn't it

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1 necessary for Reserve Banks to undertake an
2 individualized risk assessment of each
3 institution to assess the risk presented by that
4 institution to the Reserve Bank?

5 A Most emphatically, no. What it should
6 do is defer to those exact determinations by the
7 appropriately situated authority to -- that has
8 been put in place to assess precisely that risk
9 profile. And, again, that might be the Fed if
10 we're talking about member banks, bank holding
11 companies, financial holding companies, et
12 cetera, but it might be the OCC, and it might be
13 the FDIC, and it might be a state banking
14 authority.

15 Q So for Custodia that would be the
16 Wyoming Division of Banking?

17 A That's right.

18 Q And so it's your opinion that the
19 Federal Reserve Bank of Kansas City has to defer
20 to Wyoming Division of Banking's assessment of
21 the risk that Custodia presents to the Federal
22 Reserve Bank of Kansas City?

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1 A That's right. That deference is the
2 beating heart of the dual banking system.

3 Q Okay. And it's your opinion that
4 Congress intended through the Monetary Control
5 Act to empower states to be state-chartered --
6 states to be the gatekeepers of access to Federal
7 Reserve services?

8 A Well, the Constitution does -- does
9 that even preceding the creation of the Federal
10 Reserve System by creating state banks.

11 The Federal Reserve System was created
12 institutionally on top of a system of
13 state-chartered banks and national-chartered
14 banks, and so the order of operations is
15 reversed. The states come first and then the
16 Federal Reserve.

17 Q So referring back to the guidelines,
18 principle 2, here the Board is saying that
19 Reserve Banks should -- connection with an
20 account access request should consider whether
21 the institution presents or creates risk to the
22 Reserve Bank.

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1 Do you see that?

2 A Which -- which subpoint? Sorry.

3 Q Principle -- Principle No. 2 on page
4 36.

5 A I see that. And is there a subpart
6 that you're reading or just --

7 Q No, just --

8 A -- the top? Yeah.

9 Q -- the -- just Principle No. 2.

10 A Yeah.

11 Q And it's your opinion that what
12 Congress intended with the Monetary Control Act
13 is that this consideration be handled by the
14 state banking authority?

15 A No. To be handled by the Federal
16 Reserve for member banks and for bank holding
17 companies and financial holding companies, for
18 the FDIC for state, nonmember banks that were
19 members of the deposit insurance corporation or
20 the system, for the Comptroller of the Currency
21 for national banks and for state banking
22 authorities for those few banks that were not

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1 institution imposes risk. Risk cannot be
2 eliminated. They all do. That was true in 1980,
3 and it's true in 2023.

4 And what the framers of the MCA were
5 saying is the Federal Reserve is now out of the
6 business of conditioning access to its priced
7 services on its own assessments of what is good
8 and right and just and true for the Federal
9 Reserve System or for America or for the world.
10 It was saying that we are going to bring the
11 entire dual banking system into that threshold
12 assessment and make those priced services
13 available to all.

14 Q So you're saying that every snowflake
15 gets not only an account, but also the use of the
16 services therein, even if they present risk to
17 the Federal Reserve System?

18 A And here again, that is a tautology,
19 because every bank presents risk. Every single
20 bank presents risk. There's no such thing as a
21 risk-free bank, even one that doesn't have
22 customers, and so, in that sense, saying that

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1 every bank that presents risk that is legally
2 eligible as a depository institution is the same
3 as saying every legally eligible depository
4 institution.

5 Q I see. And so it's your opinion this
6 is what the framers of the Monetary Control Act
7 intended, that every snowflake gets to use the
8 services, even if they present risk to the
9 system?

10 A So, again, the term "snowflake bank" is
11 a term of art at this table. I quite like it.
12 It's definitely not something that Senator
13 Proxmire was thinking about, but he was thinking
14 very carefully about the question of, in his
15 words, open access. And so the idea that the
16 Federal Reserve would then be able to sneak in a
17 risk assessment that would block access as though
18 access were still on the pre-1980 membership
19 status would be inconsistent with the intentions
20 of Senator Proxmire and his associates and that
21 Congress.

22 Q Okay. And it's also your opinion if

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1 the Reserve Bank is conducting an individualized
2 risk assessment of a bank and determines that
3 that bank had -- does present risk to the system
4 that it can restrict use of services, but not
5 entirely?

6 A It can -- I don't express the opinion
7 that it can do so in an idiosyncratic, bespoke
8 fashion. I do express the opinion that through
9 regulation creating clear parameters of the use
10 of its priced services that does not constitute
11 the elimination of access, either in effect or in
12 fact, that that regulatory framework is
13 consistent with the way the Fed has responded to
14 the MCA since its passage.

15 Again, I don't make a legal
16 determination about whether it has the authority
17 to do so, as your question posed, but about
18 whether it's consistent with practice.

19 MR. MICHAELSON: Okay. It's about --
20 we've been going over an hour, and it's about
21 noon. Should we continue for a bit or break for
22 lunch? Do you have -- do you have a preference?

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1 MR. SCARBOROUGH: I leave it up to you.

2 THE WITNESS: I mean, I'm good.

3 MR. SCARBOROUGH: Do you want to -- do
4 you want to take like five minutes and then do
5 another 30, 45 minutes, and then grab lunch or --

6 MR. MICHAELSON: Well, whatever --
7 whatever you prefer.

8 THE WITNESS: You guys are the ones
9 that have been to this rodeo before. I don't
10 know. But I'm comfortable going or breaking or
11 --

12 MS. CARLETTA: Lunch is ready.

13 MR. MICHAELSON: Yeah.

14 THE WITNESS: -- whatever you want.

15 MR. SCARBOROUGH: Is lunch ready?

16 MR. MICHAELSON: Yeah.

17 MS. CARLETTA: Lunch is ready.

18 MR. MICHAELSON: Lunch is ready. Why
19 don't we break for lunch, and we'll come back.

20 THE WITNESS: Okay.

21 (Whereupon, at 12:00 p.m., a
22 luncheon recess was taken.)

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1 framework in the way that you and I might.

2 Q So if an institution requests a master
3 account from a Reserve Bank -- well, strike that.

4 A Reserve Bank is exposed to risk
5 arising from the provision of services to an
6 entity with a master account, correct?

7 A That's right.

8 Q And is it your opinion that there are
9 restrictions on Reserve Banks' ability to manage
10 that risk?

11 A I don't offer legal opinions of what
12 the Fed can and cannot do. I can opine that the
13 intentions of the framers of the MCA intended to
14 remove the Federal Reserve from exercising risk
15 management or other discretionary practices to
16 turn access to services into a quasi-membership
17 status. And so, in that sense, what the Federal
18 Reserve has been instructed to do, at least by
19 the intentions of the MCA's framers, is to use
20 the risk assessments that had been performed by
21 either the sister regulatory and supervisory
22 organizations at the federal level or by the

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1 state authorities in our federal system of dual
2 banking.

3 Q When you say the framers of the MCA,
4 who -- who are you referring to?

5 A Members of Congress, other participants
6 who lobbied for its -- its passage, people like
7 Paul Volcker, William Proxmire, people like that.

8 Q Okay. And so you are expressing the
9 opinion that they intended to restrict Reserve
10 Banks' ability to manage the risk presented by
11 the grant of master accounts to -- to
12 institutions?

13 (Cell phone interruption.)

14 MR. SCARBOROUGH: Objection.

15 THE WITNESS: Are you objecting to
16 yourself? Okay.

17 MR. MICHAELSON: He was objecting to
18 me.

19 THE WITNESS: Yeah.

20 BY MR. MICHAELSON

21 Q It is -- it is your opinion that the --
22 that the intent behind the Monetary Control Act

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1 was to restrict Reserve Banks' ability to manage
2 the risk presented by master accounts?

3 MR. SCARBOROUGH: Objection.

4 THE WITNESS: No, not in those terms.

5 It's my testimony that the framers of the MCA
6 intended for the Federal Reserve to engage with
7 other government entities to engage in whatever
8 risk assessments it felt it needed to engage with
9 respect to depository institutions that it, prior
10 to 1980, might engage bilaterally with respect to
11 access to those services.

12 After 1980, the expectation by the
13 framers would be that the Federal Reserve engage
14 on those very questions, should they have them,
15 with other -- other government entities.

16 But here again, I'm not citing any
17 specific statement to that effect because this is
18 not a question that they were contemplating in
19 terms of the specific processes of risk
20 assessment or counterparty risk or -- or daylight
21 overdrafts or the like. I didn't see discussion
22 at that level of specificity, so my opinion is at

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1 a level of abstraction higher.

2 BY MR. MICHAELSON

3 Q Did the Monetary Control Act impose on
4 states any new obligations to assess risk
5 presented to Reserve Banks by the issuance of
6 master accounts and services?

7 A I'll leave the legal interpretation of
8 the MCA to the Court to determine, so I can't --
9 I don't have an opinion about what the MCA
10 imposed or did not impose.

11 Q You don't have an opinion on what the
12 MCA imposed or did not impose?

13 A I don't have an opinion about the legal
14 interpretation of the scope of the MCA in terms
15 of the authorities or restrictions that it
16 placed.

17 Q Okay. But you are opining on the
18 intent -- the legislative intent behind the
19 statute, right?

20 A (Nodding.)

21 Q And did --

22 MS. CARLETTA: Hold on. You have to

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1 answer verbally. Sorry.

2 THE WITNESS: Yes, that's right.

3 BY MR. MICHAELSON

4 Q And did the legislators who passed the
5 MCA intend to impose on states the obligation to
6 assess risk presented to Reserve Banks by the
7 issuance of master accounts to state-chartered
8 nonmember institutions?

9 A It's my opinion that that is the
10 implication of the framers' intention, although
11 they did not state that exact fact, so I'm not
12 quoting one of the MCA's framers to that effect.

13 What I -- the expert opinion that I
14 offer in terms of the legislative history of the
15 MCA is that the framers intended to remove the
16 Federal Reserve from its position, former
17 position, of engaging in precisely these kinds of
18 assessments and to leave those assessments to the
19 other relevant governmental agencies at the state
20 or federal level.

21 Q So you're saying that it was an
22 unintended consequence of the Monetary Control

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1 Act?

2 A No.

3 MR. SCARBOROUGH: Objection.

4 BY MR. MICHAELSON

5 Q You're saying it's just an unstated
6 implication of the Monetary Control Act?

7 MR. SCARBOROUGH: Objection.

8 THE WITNESS: I'm saying it's an
9 implication of their decision to remove the
10 Federal Reserve from engaging in threshold-level
11 evaluations about whether legally eligible
12 depository institutions can gain access to
13 Federal Reserve services.

14 BY MR. MICHAELSON

15 Q So did the framers of the MCA, in your
16 view, intend that result or not?

17 A They did intend that result.

18 Q They did?

19 A Yes.

20 Q While at the same time imposing no new
21 obligations on the states to consider risk to
22 Reserve Banks?

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1 A The obligations on the states that did
2 exist were defined primarily by state law, except
3 insofar as these state depository institutions
4 sought to gain membership either to the federal
5 deposit insurance system or to the Federal
6 Reserve system.

7 Q To your knowledge, is there any statute
8 that requires the Wyoming Division of Banking to
9 consider risks to the Reserve Bank of Kansas City
10 presented by state-chartered institutions subject
11 to its supervision?

12 A Not to my knowledge, no.

13 Q Okay. In front of you is the condition
14 monitoring guidelines, 2019. It's exhibit --
15 Exhibit 55 in this case. And this section on
16 page 6 concerns risk ratings.

17 Is -- is it your understanding that the
18 implication of the Monetary Control Act is that
19 these risk ratings should be assessed and applied
20 by the Wyoming Division of Banking and not the
21 Reserve Bank of Kansas City for state-chartered
22 nonmember institutions?

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1 MR. SCARBOROUGH: Objection.

2 THE WITNESS: I don't offer an opinion
3 about the soundness or lack thereof of these
4 specific categories, no.

5 BY MR. MICHAELSON

6 Q My -- my question is: What did -- when
7 Congress passed the Monetary Control Act, did it
8 intend for Wyoming to take over the
9 responsibilities reflected in this exhibit?

10 A So a few parts in my answer to your
11 question. So the first is, I'm not aware that
12 these responsibilities existed in 1980 as they
13 are defined here, so I don't think that the
14 framers of the MCA had these specific
15 responsibilities in mind.

16 It is my testimony that the framers of
17 the MCA intended for the Federal Reserve to defer
18 to the supervisory assessments made by the
19 supervisors, which the Federal Reserve was not
20 for nonmember banks other than for holding
21 companies and -- and others identified by
22 statute.

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1 banking history, including the passage of various
2 statutes.

3 Q Are you expressing an opinion about
4 congressional intent on any statute other than
5 the Monetary Control Act?

6 A Not -- not as such, except in service
7 of the opinion that I offer about what the
8 framers of the MCA intended to do.

9 Q Are you expressing an opinion about
10 the -- are you familiar with Section 342 that
11 says Reserve Banks may accept deposits?

12 A Of the Federal Reserve Act, yeah.

13 Q Yes?

14 A Yes.

15 Q You're familiar with that?

16 A Yes.

17 Q Are you expressing an opinion on the
18 congressional intent behind that opinion?

19 A No.

20 Q Okay. And are you able to point to any
21 federal statute that authorizes Reserve Banks to
22 take actions to mitigate risk to that Reserve

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1 Bank presented by state-chartered nonmember banks
2 with master accounts?

3 A I don't offer opinions about what
4 statutes authorize or don't authorize, which I
5 would regard as a legal conclusion left to the
6 Court to decide.

7 MR. MICHAELSON: Let's mark this
8 document here.

9 (Deposition Exhibit Number 304 was
10 marked for identification.)

11 BY MR. MICHAELSON

12 Q I'm handing you a document marked 304,
13 Exhibit 304, which is entitled -- entitled
14 "Guidance for Federal Reserve Financial Services
15 Applicants That Are Deemed High Risk by the
16 Federal Reserve Bank of New York."

17 Do you see that?

18 A I do.

19 Q And I'll refer you to the end. At the
20 very end, you'll see that it's dated August 18,
21 2014. Do you see that?

22 A I do.

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1 Q I'll give you a moment to review it,
2 and my question is whether you've seen it before.

3 A May I ask, this is a public document?

4 Q It is a public document.

5 A It looks familiar to me, but I don't
6 know that I have -- if I have relied upon it for
7 my report. I don't think that I did, but it is
8 very possible that I have seen it before.

9 Q Okay. And it says in the second
10 paragraph that for each high-risk applicant for
11 Federal Reserve services, the Bank will conduct
12 enhanced due diligence and risk assessment, and
13 the Bank may take steps to mitigate risks posed
14 by the applicant.

15 Do you see that?

16 A I do.

17 Q Are you expressing an opinion on this
18 case on whether, in 2014, the Federal Reserve
19 Bank of New York had statutory authority to do
20 that?

21 A I don't express opinions about whether
22 the -- what statutory authority the Federal

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1 Reserve or any of its Reserve Banks does or does
2 not have.

3 Q Okay. But it is your opinion, though,
4 that this conduct by the Federal Reserve Bank of
5 New York would be inconsistent with the intent of
6 the drafters of the Monetary Control Act?

7 A Not necessarily. It depends entirely
8 on what is meant by the steps taken to mitigate
9 risk, risks posed by the applicant.

10 Q I see. So if those steps to mitigate
11 risk included restricting access to a service to
12 mitigate risk without entirely eliminating use of
13 the service, that could be consistent with the
14 Monetary Control Act?

15 MR. SCARBOROUGH: Objection to form.

16 THE WITNESS: It might be. I'd need to
17 know more about what -- the nature of the service
18 restrictions, the process through which that
19 conclusion was reached and what relationship the
20 Federal Reserve Bank had with the supervising
21 authority, supervising authority of the legally
22 eligible depository institution.

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1 master account based on the Fed's own assessments
2 of credit and other risks may be entirely
3 consistent with the Fed's historical practice
4 following 1980, correct?

5 A I -- I doubt that very much. I do not
6 think that is true, in fact.

7 Q So you are expressing an opinion on
8 whether -- whether the Fed had a historical
9 practice of conducting an evaluation like this
10 prior to 2022?

11 A So in my search of the news coverage of
12 accounts and master accounts, I found documents,
13 for example, from the Dallas Fed and news
14 statements from the Cleveland Fed talking about
15 the fact that new applications for a master
16 account would be acted upon within days. The
17 idea that this would happen so quickly seems
18 inconsistent to me to the searching evaluation
19 that I described following the promulgation of
20 these guidelines in 2022.

21 Q I see. So you relied -- and you relied
22 on those documents from -- it was the Dallas Fed?

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1 A I believe it was the Dallas Fed and
2 then statements again from the Cleveland Fed and
3 perhaps the Dallas Fed, too, in the news.

4 Q All right. Have you seen Exhibit 304?

5 A What is that?

6 Q Guidance for Federal Reserve Financial
7 Services Applicants Deemed High Risk by New
8 York -- Reserve Bank of New York.

9 A I see that now. I didn't rely on this
10 for my report, but having gone through it with
11 you today, it doesn't change my opinion.

12 Q Okay. It doesn't change your opinion
13 even though it says on page 1, for each high-risk
14 applicant, the Reserve Bank of New York will
15 conduct enhanced due diligence and a risk
16 assessment?

17 A The -- I do see that and I don't -- it
18 doesn't change my opinion because I don't know
19 how they reached the determination of high-risk
20 applicants. It may have been something -- and I,
21 in fact, assume that it would be -- something
22 that occurred well after the fact that an account

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1 had been given to a legally eligible depository
2 institution, and that fact makes this
3 inconsistent with the searching evaluation that's
4 described in 2022 to gain access to those
5 services in the first instance.

6 Now, it may well be that the policy
7 document that we're seeing here refers to that
8 access in general, but the document itself
9 doesn't stand for the proposition of the
10 individual assessments that may or may not have
11 occurred.

12 Q Okay. You see, though, on the first
13 paragraph it says that it applies where a
14 financial institution is, quote, seeking an
15 account or requesting to use one or more
16 financial services, right?

17 Do you see that?

18 A I do see that.

19 Q Does that change your opinion?

20 A It doesn't change the opinion offered
21 in my expert report. The opinion I offer in my
22 expert report about whether there's a searching

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1 evaluation for the attempts to execute a master
2 account agreement is not contradicted by the 2014
3 New York Fed policy statement, because the New
4 York Fed policy statement, it refers to those
5 applicants who are already deemed high risk at
6 the point of application as opposed to an
7 undertaking that reviews that status.

8 I do not see anything in the New York
9 document that suggests all -- all attempts to
10 execute a master account agreement were subject
11 to the evaluations described in this document,
12 only, in fact, to those that were considered to
13 be a, quote-unquote, high-risk applicant.

14 Q Well, the second paragraph said that
15 the bank deemed certain categories of financial
16 institutions seeking an account to be high-risk
17 applicants.

18 Do you see that?

19 A I do see that.

20 Q So isn't it -- isn't it New York that's
21 deciding -- the Federal Reserve Bank of New York
22 deciding whether an applicant is a high-risk

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1 applicant, and if so, conducting enhanced due
2 diligence and risk assessment before providing
3 that applicant access to services in 2014?

4 A As I look at the rest of the document
5 and see the kinds of high risk that they're
6 talking about, it refers to AML and OFAC. AML
7 refers to Anti-Money Laundering and OFAC refers
8 to the Office of Foreign Asset Control. And the
9 kinds of organizations that are deemed high risk,
10 besides a catch-all category at the end, refers
11 to those institutions that are either chartered
12 or exist outside of the United States, which is
13 indeed what an Edge Act is -- Edge Act or
14 agreement corporation and the like.

15 I would regard this, then, to be
16 applicable not to, necessarily, those,
17 quote-unquote, legally eligible depository
18 institutions as that category was -- to the
19 extent that I understand that category in line
20 with the intentions -- intentions of the framers
21 of the MCA, because this is dealing with foreign
22 banks, largely, which is not the primary concern

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1 of the MCA.

2 Q You interpret this as applying largely
3 to foreign banks?

4 A I do.

5 Q So it's your opinion that as you read
6 this today, this is consistent with the framers'
7 intent of the Monetary Control Act?

8 MR. SCARBOROUGH: Objection to form.

9 THE WITNESS: As I read this today, it
10 is appropriate -- it is consistent with the --
11 with the framers of the Monetary Control Act
12 because the high-risk applicants identified by
13 the New York Fed, all of which would be
14 supervised by the New York Fed, not by individual
15 states in the United States or by the Comptroller
16 of the Currency or the FDIC.

17 BY MR. MICHAELSON

18 Q So it's your testimony that this
19 doesn't apply to state-chartered nonmember banks?

20 A I don't offer testimony about the
21 application of the Fed's own policy statements or
22 regulations, which I would regard as a legal

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1 proposed -- each bank is unique in its --

2 Q I see.

3 A -- risk profile, and so I don't know
4 how I would answer that question.

5 Q So your view, then, is that this --
6 this notification -- this -- this comment in the
7 S letter about preliminary notification to Board
8 staff, which makes reference to requests that
9 raise novel issues, that that would encompass
10 every request because every bank raises novel
11 issues?

12 A Elsewhere in either the S letter or in
13 the guidelines -- I think it's the S letter -- it
14 makes clear that even for those banks, the
15 so-called Tier 1 institutions that are not
16 engaged in what the Board calls, quote-unquote,
17 novel forms of banking, may be subject to exactly
18 this kind of searching evaluation.

19 And so it -- there is no limiting
20 principle that I can discern in the S letter or
21 in the guidelines that would give a single bank
22 comfort that it will have a straightforward

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1 process similar to what predominated between 1980
2 and 2015.

3 Q Okay. But let's be clear about what
4 was -- your knowledge of what was happening from
5 1980 to 2015.

6 You have no basis to opine on whether
7 Reserve Banks were conducting risk assessments on
8 institutions that requested master accounts from
9 1980 to 2015, correct?

10 A No, that's not correct.

11 Q Okay. We looked at earlier, for
12 example, the New York Fed policy for high-risk
13 institutions for 2014, right?

14 A We -- we did look at that document,
15 yes.

16 Q Okay. Were you aware of that before
17 today?

18 A I was not aware of that document before
19 today, no.

20 Q Okay. That reflects that Reserve Banks
21 were conducting risk assessments of entities
22 requesting a master account prior to 2015,

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1 correct?

2 A No.

3 Q Okay. So in 2015, when Fourth Corner
4 came around, which is brand new, for the first
5 time, Federal Reserve Bank conducting a risk
6 assessment of an entity requesting a master
7 account?

8 MR. SCARBOROUGH: Objection to form.

9 THE WITNESS: Do you have a question?

10 BY MR. MICHAELSON

11 Q Yeah. Was that -- you're saying that
12 Fourth Corner in 2015 was the first time that a
13 Reserve Bank subjected an entity requesting a
14 master account to any scrutiny or risk
15 assessment?

16 A No.

17 Q Okay. What was happening before 2015?

18 A The public record as we have it based
19 on comments around the time of the creation of
20 the master account, 1998, makes clear that there
21 was some kind of process that occurred, but in
22 the -- and I don't have the exact words, but I'll